

- (1) The Court of Appeal could not agree that the trial judge was equivocal in his

- finding of a prima facie case. The trial judge clearly stated that he found both possession and trafficking proven. This entitled him to call for the appellant's defence on the charge of trafficking. The issue rather was whether on the evidence before him, he was justified to make such a finding (see para 7). A
- (2) The DPP was not wrong to say that the trial judge had not invoked any of the statutory presumptions since no such reference was made in his grounds of decision for calling the defence. However, the trial judge also did not say anywhere that the appellant was deemed to be trafficking because of the large amount of drugs (see para 8). B
- (3) The trial judge found the appellant to be in possession of the drugs with knowledge inferred from the appellant's own conduct in throwing away the red plastic bag (P 14) and attempting to escape when the police tried to apprehend him. However the trial judge did also state that the appellant's conduct could also be imputed to his reaction when taken by surprise, which conduct could not then infer knowledge of the drugs being carried. The trial judge had also inferred the appellant's knowledge on the basis of non-existent evidence (see para 11). C D
- (4) Where more than one inference could be drawn from a set of facts, the court must adopt the inference most favourable to an accused person. The trial judge clearly misdirected himself in law when he inferred from the appellant's conduct that he knew about the drugs when the same conduct, as conceded by the trial judge, could have also inferred otherwise (see para 12). E
- (5) In the instant case, the prosecution only established custody and control of the drugs by the appellant thereby attracting the statutory presumption of possession under s 37(d) of the DDA. Such presumed possession would not attract the presumption of trafficking under s 37(da) of the DDA. The learned judge had erred in calling for the appellant's defence on the charge of trafficking when his defence should have only been called on a reduced charge of possession (see paras 13–14). F
- (6) To arrest the ensuing social problem and deteriorating drug abuse among the youth the public interest would be best served by a deterrent sentence being imposed. The appellant — a young first offender — should be sentenced to 20 years' imprisonment from the date of his arrest and caned the statutory minimum of 10 strokes (see para 16). G

[Bahasa Malaysia summary]

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Perayu telah merayu ke Mahkamah Rayuan terhadap sabitan dan hukuman mati Mahkamah Tinggi atas tuduhan mengedar dadah di bawah s 39(b)(2) Akta Dadah Berbahaya 1952 ('ADB'). Fakta-fakta menunjukkan bahawa semasa perayu diberkas dalam satu serang hendap, beliau telah mengeluarkan satu beg plastik merah (P 14) daripada bakul depan motorsikalnya, membuangnya dan cuba melarikan diri. Beg plastik merah itu (PW14) kemudiannya didapati mengandungi dua bungkus kanabis yang dibungkus dalam akhbar bahasa Cina. Di Mahkamah Rayuan, peguam bagi pihak perayu berhujah bahawa: (i) tiada kes prima facie dibuktikan kerana hakim perbicaraan di penutup kes pendakwaan taksa sama ada ia merupakan satu kes I

- A pemilikan atau pengedaran; (ii) hakim perbicaraan hanya membuat inferens bahawa perayu memiliki dadah berbahaya; (iii) dan pihak pendakwaan hanya membuktikan satu kes pemilikan dadah berbahaya dan oleh itu pembelaannya hanya boleh dipanggil berdasarkan satu pertuduhan pemilikan yang dikurangkan. Timbalan Pendakwa Raya ("TPR") berhujah bahawa hakim perbicaraan tidak menggunakan apa-apa anggapan statutori. Beliau sebaliknya telah bergantung kepada
- B pemilikan fizikal sebenar dan berdasarkan jumlah besar dadah yang terlibat perayu dianggap telah melakukan pengedaran.
- C **Diputuskan**, membenarkan rayuan:
- (1) Mahkamah Rayuan tidak bersetuju bahawa hakim perbicaraan taksa dalam penemuan satu kes prima facie. Hakim perbicaraan jelas menyatakan bahawa beliau mendapati kedua-dua pemilikan dan pengedaran telah dibuktikan. Ini membenarkannya memanggil untuk pembelaan perayu atas pertuduhan
- D pengedaran. Isunya lebih kepada sama ada berdasarkan keterangan di hadapannya, beliau dijustifikasikan untuk membuat penemuan sedemikian (lihat perenggan 7).
- (2) TPR tidak salah untuk menyatakan bahawa hakim perbicaraan tidak menggunakan apa-apa anggapan statutori memandangkan tiada rujukan dibuat dalam alasan keputusannya untuk memanggil pembelaan.
- E Namun, hakim perbicaraan juga tidak menyatakan bahawa perayu dianggap mengedar disebabkan oleh jumlah dadah yang banyak (lihat perenggan 8).
- (3) Hakim perbicaraan mendapati bahawa perayu berada dalam milikan dadah dengan pengetahuan yang disimpulkan daripada tindakan perayu sendiri yang membuang beg plastik merah itu (P 14) dan cubaan melarikan diri semasa
- F polis memberkasnya. Namun hakim perbicaraan juga menyatakan bahawa tindakan perayu boleh disebabkan oleh reaksinya semasa terkejut, yang mana tindakan tidak boleh dibuat inferens bahawa terdapat pengetahuan yang beliau membawa dadah tersebut. Hakim perbicaraan juga membuat inferens bahawa pengetahuan perayu adalah berdasarkan keterangan yang tidak wujud (lihat
- G perenggan 11).
- (4) Di mana terdapat lebih dari satu inferens yang boleh disimpulkan daripada satu set fakta, mahkamah hendaklah menggunakan inferens yang menyebelahi tertuduh. Hakim perbicaraan jelas telah salah arah dari segi undang-undang apabila beliau membuat inferens daripada tindakan perayu bahawa beliau
- H mengetahui tentang dadah apabila tindakan sama, seperti yang diakui oleh hakim perbicaraan, boleh juga membuat inferens sebaliknya (lihat perenggan 12).
- (5) Dalam kes semasa, pihak pendakwaan hanya membuktikan jagaan dan kawalan dadah oleh perayu dan oleh itu menunjukkan anggapan statutori
- I pemilikan di bawah s 37(d) ADB. Anggapan pemilikan sebegini tidak menarik anggapan pengedaran di bawah s 37(da) ADB. Hakim yang bijaksana terkhilaf dalam memanggil pembelaan perayu atas pertuduhan pengedaran apabila pembelaannya sepatutnya hanya boleh dipanggil atas pertuduhan pemilikan yang dikurangkan (lihat perenggan 13–14).

- (6) Untuk menarik perhatian masalah sosial berikutnya dan penyalahgunaan dadah yang semakin teruk di kalangan remaja demi kepentingan awam satu hukuman pencegahan patut dikenakan. Perayu — pesalah muda kali pertama — patut dijatuhkan hukuman penjara 20 tahun dari tarikh tangkapan dan disebat menurut statutori minimum sebanyak 10 kali (lihat perenggan 16).]

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Notes

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For cases on assessment of sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3400–3406.

For cases on drug trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 504–510.

For cases on inference from conduct of accused, generally, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1791–1793.

C

Cases referred to

Looi Kow Chai v PP [2003] 2 MLJ 65 (refd)

Mohammad Hassan v PP [1998] 5 MLJ 68

D

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 37(d), 37(da), 39B(1)(a), 39B(2), 39A(2)

Appeal from: Criminal Trial No 45–10 of 1995 (High Court, Kuala Lumpur)

E

Karpal Singh (Karpal Singh & Co) for the appellant.

Teo Say Eng (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Tengku Baharudin Shah JCA (delivering judgment of the court):

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INTRODUCTION

[1] The appellant's appeal is against his conviction and death sentence for trafficking in dangerous drug (1,989g of cannabis) ('the drug') at a bus stop near Sekolah Menengah Kebangsaan Jinjang Utara, Kuala Lumpur on 12 February 2002, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). He was arrested on a motorcycle bearing registration number WJC 360 which had stopped at the bus stop where Chief Inspector Tansli Mering (SP10) and his police team lay an ambush based on information received identifying the said motorcycle. SP10 and SP11, a member of his team, approached the appellant who, when SP10 introduced himself as a police officer, was alleged to have thrown away a red plastic bag ('P 14') containing the drug in two packets wrapped in Chinese newspapers, and attempted to escape with the motorcycle. He was however apprehended after a struggle.

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THE APPEAL

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[2] It was submitted before us that no prima facie case was made out against the appellant on the charge of trafficking at the close of the prosecution case. This is because the learned trial judge in his finding at that stage was not equivocal whether it was possession or trafficking.

- A** [3] We were referred to the learned judge's note (see p 64 of the appeal record) to the effect that the prosecution had succeeded in proving *prima facie* that the appellant was in possession of and was trafficking in the said drug and therefore called him to enter his defence on the charge under s 39B(1)(a) of the DDA.
- B** [4] It was further contended on the facts as found by the learned judge it was also unclear whether he found possession or trafficking, as in his grounds of decision he mentioned 'evidence without inference' to show that the appellant had exclusive custody and control of the drug and also knowledge of it (see p 86 of the appeal record). He did not appear to have invoked the statutory presumption of trafficking.
- C** [5] It was also submitted that the learned trial judge simply found the appellant in possession of the drug on the motorcycle. Even that was by inference or presumption though the judge did not say so. Hence learned counsel urged upon us to reduce the charge to possession which he conceded was proven.
- D** [6] The learned deputy contended that the learned trial judge did not invoke any of the statutory presumptions. The court relied on actual physical possession and based on the large amount of drug involved the appellant was deemed to be trafficking. We note that when submitting in the court below the prosecution relied on the presumption of trafficking under s 37(da) of the DDA (see p 62 of the appeal record).
- E**

FINDING

- F** [7] We do not agree with learned counsel that the learned judge was equivocal in his finding of a *prima facie* case. He clearly states that he found both possession and trafficking proven which should entitle him to call for the appellant's defence on the charge of trafficking. But the question is whether on the evidence before him he was justified to so find.
- G** [8] The learned deputy is not wrong to say that the learned judge did not invoke any of the statutory presumptions because no such reference was made in his grounds of decision for calling the defence. But the learned judge also did not say anywhere that the appellant was deemed to be trafficking because of the large amount of drug.
- H** [9] In calling for the appellant's defence, the learned judge merely said that he applied the test propounded by this court in *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65. We take him to mean that he had subjected the prosecution evidence to maximum evaluation and asked himself the question, 'If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case?'
- I** If the answer is in the negative, then no *prima facie* case had been made out and the accused would be entitled to an acquittal ...' as submitted by learned counsel.

[10] The learned judge was satisfied that there was no breach in the chain of evidence relating to custody of the said drug after recovery and accepted the

testimony of SP4 on the identity and weight of the same as they were unchallenged. He did not however state his finding on the testimony of SP10 which he merely narrated and found support from SP11's evidence apart from stating that they both saw the appellant shiver when approached by SP10, throw P 14 from the motorcycle and try to escape with the motorcycle. With that the learned judge appeared to have made a finding of prima facie case that the appellant had exclusive custody and control of the cannabis in the charge and had knowledge of the same and that the court could, on the available evidence, convict him for trafficking under s 39B of the DDA (see pp 86–87 of the appeal record).

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[11] We would not be wrong to assume that the learned judge accepted the prosecution's narrative of the case for in the later part of his judgment, when considering the defence, he states that the appellant was found in possession of the drug with knowledge being inferred from his own conduct in throwing it out of the motorcycle and attempting to escape when the police tried to apprehend him (see p 91 of the appeal record). But the learned judge himself states immediately thereafter that though such conduct of the appellant could also be imputed to his reaction when taken by surprise, which conduct could not then infer knowledge of the drug being carried, he (the judge) was in all the circumstances of the case of the view that the court could also take the inference to the contrary, which he apparently did. He also inferred that the appellant was aware of the drug on the ground that anyone having possession of P 14 would know its contents because of the loose packing in Chinese newspapers when there was no such evidence.

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[12] It is trite law that when more than one inference can be drawn from a set of facts, then the court must adopt the inference most favourable to an accused person. The learned judge had therefore clearly misdirected himself in law when he inferred from the appellant's conduct that he knew about the drug wrapped in Chinese newspapers inside P 14 when the same conduct, as conceded by the learned judge, could also infer otherwise.

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[13] The prosecution case is thus left only with custody and control of the drug by the appellant which established fact would attract the statutory presumption of possession under s 37(d) of the DDA. Such presumed possession would not attract the presumption of trafficking under s 37(da) of the DDA as that applies only if the drug is found in the appellant's possession and not when he is presumed to be so found as in this case. See *Mohammad Hassan v Public Prosecutor* [1998] 5 MLJ 68. The learned judge had therefore erred in calling for the appellant's defence as he did.

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[14] As conceded by learned counsel for the appellant in his submission and indeed proven to the satisfaction of the learned judge in the court below, the prosecution only established a case of possession of the drug for the appellant to rebut, as such his defence should only have been called on a charge so reduced.

CONCLUSION

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[15] In all the circumstances aforesaid we allowed the appeal and set aside the appellants conviction and sentence and substituted the conviction with one under s 6 of the DDA read with s 39A(2).

- A** [16] In assessing sentence, we considered the submission of learned counsel that the appellant was a young first offender but also took judicial notice that cases of this nature were rampant. To arrest the ensuing social problem and deteriorating drug abuse among the youth we felt that public interest would be best served by a deterrent sentence being imposed. We sent the appellant to prison for 20 years with effect from the date of his arrest and ordered that he be given the statutory minimum of 10 strokes of the rotan.
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Appeal allowed.

- C** Reported by Andrew Christopher Simon
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